

(29)

Office - Supreme Court, U.
FILED

MAR 2 1942

CHARLES ELMORE CROPL
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 992

315-874

Handwritten
LAZZARO LA GUERRA,

Respondent,

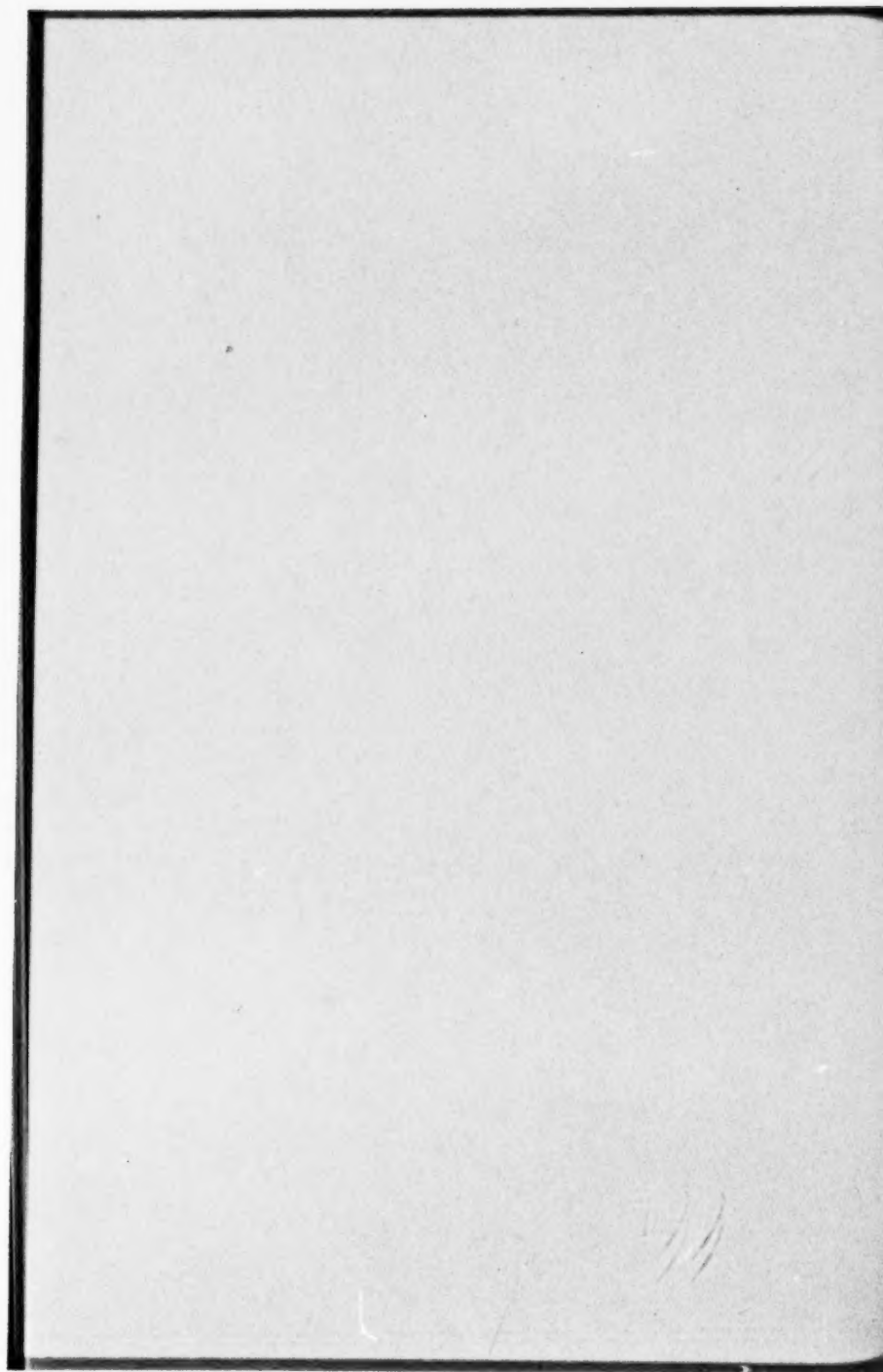
v.

LLOYD BRASILEIRO,

Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

OSCAR R. HOUSTON,
Counsel for Petitioner,
99 John Street,
New York, N. Y.



INDEX.

PETITION.

	PAGE
Summary and Statement of Matter Involved	2
Jurisdiction of the Court	3
The Question Presented	4
Reasons for Allowance of Writ	5

BRIEF.

The Facts	11
-----------------	----

POINT I—The decision in the present case is based directly upon the rejection of the rules governing in cases of this kind, as previously laid down by this Circuit Court and as laid down by the courts of other circuits	11
--	----

POINT II—The decision in this case seriously prejudices the uniformity of the general maritime law. It radically alters the duties of vessel owners as they heretofore existed. It makes the vessel owner an insurer of the safety of stevedores. It presents a matter of high national interest because it imposes on vessel owners such a great degree of care that the work of loading and discharging vessels will be hindered and delayed at a time when the vital needs of war shipping require such work to proceed with all possible dispatch	19
---	----

Conclusion	21
------------------	----

TABLE OF CASES CITED:

	PAGE
<i>Atlantic Transport Co. v. Imbroeck</i> , 234 U. S. 52 (decided May 25, 1914)	8, 19
<i>Beechden, The</i> , 121 F. 593 (decided January 6, 1899)	7, 13, 14, 15
<i>Belos, The</i> (not officially reported), 1939 A. M. C. 324 (decided March 15, 1939)	15
<i>Bettis v. Frederick Leyland & Co., Ltd.</i> , 153 F. 571 (decided March 12, 1907)	7, 15
<i>Bryant v. Vestland</i> (C. C. A. 5), 52 F. (2d) 1078 (decided Oct. 27, 1931)	7, 16
<i>DeLuca v. Shepard</i> (C. C. A. 2), 65 F. (2d) 566, 67 F. (2d) 437 (decided November 13, 1933)	6
<i>Ellenor, The</i> (D. C. Florida), 39 Fed. Supp. 576 (decided May 26, 1941)	7, 17
<i>Grays Harbor Stevedore Co. v. Fountain</i> (C. C. A. 9), 5 F. (2d) 385 (decided April 27, 1925)	7, 17, 18
<i>Hindustan, The</i> , 37 F. (2d) 932, aff'd. (C. C. A. 2) 44 F. (2d) 1015 (decided November 3, 1930)	6
<i>Kongosan Maru, The</i> (C. C. A. 9), 292 F. 801 (decided October 19, 1923)	7, 18
<i>Long v. Silver Line</i> (C. C. A. 2), 48 F. (2d) 15 (de- cided April 6, 1931)	6
<i>Luckenbach S. S. Co. v. Buzynski</i> (C. C. A. 5), 19 F. (2d) 871 (decided June 2, 1927)	7, 16
<i>Mercier, The</i> (D. C. Oregon), 5 Fed. Supp. 511 (de- cided December 4, 1933)	7, 18
<i>Navigazione Alta Italia v. Vale</i> (C. C. A. 5), 221 F. 413 (decided March 8, 1915)	7, 16
<i>Ore Tysko v. Royal Mail</i> (C. C. A. 9), 81 F. (2d) 960 (decided February 10, 1936)	7, 18

	PAGE
<i>Prince Rupert City, The</i> (D. C. Florida), 30 Fed. Supp. 755 (decided December 7, 1939).....	7, 17
<i>Weldon v. United States, et al.</i> , 9 Fed. Supp. 347 (decided November 5, 1934)	6, 17

OTHER AUTHORITIES CITED:

Judicial Code, as Amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C. Title 28, Sec. 347), Section 240	3
Longshoreman's & Harborworker's Compensation Act (44 Stat. 1429 <i>et seq.</i> ; 33 U. S. C. A. 901 <i>et seq.</i>)	2



IN THE
Supreme Court of the United States
OCTOBER TERM, 1941.

No. .

LAZZARO LA GUERRA,

Respondent,

v.

LLOYD BRASILEIRO,

Petitioner.

**THE PETITION OF LLOYD BRASILEIRO FOR A
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

The petition of Lloyd Brasileiro, defendant in an action for damages for personal injuries suffered by plaintiff aboard the defendant's steamship "Cantuaria" for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

This is an action at law by plaintiff, a longshoreman, to recover damages for personal injuries suffered by him aboard the defendant's steamship "Cantuaria".

This petition is brought to review the decision of the Circuit Court of Appeals which reversed the decision of the District Court dismissing the action.

Summary and Statement of Matter Involved.

The facts are fully stated in the opinions below. So far as material here they may be summarized as follows: The plaintiff, a longshoreman, was injured aboard the steamship "Cantuaria" owned by defendant. He was in the employ of Universal Stevedoring Company, an independent contractor (R., p. 23), and was injured aboard the vessel, in the course of his employment in the port of New York. Although covered by the Longshoreman's & Harborworker's Compensation Act (44 Stat. 1429 *et seq.*; 33 U. S. C. A. 901 *et seq.*), he has elected to bring this third party action. The "Cantuaria", turned over to plaintiff's employer by defendant for discharge of her cargo, was docked by plaintiff's employer who then took over control of all of her hatches (R., p. 156). Plaintiff was one of eight holdmen assigned to No. 4 hatch, 'tween decks. In the forward part of No. 4 hatch were stowed bags of coffee consigned to New York. In the after part of No. 4 hatch was a cargo of cocoa beans in bags consigned to Philadelphia. The New York cargo and the Philadelphia cargo were in actual contact and supported one another so that the removal of one left the other without support (R., p. 61).

Plaintiff was a longshoreman of 17 years experience in unloading vessels (R., p. 48). After removing 6 or 7 tiers of bags of the New York cargo, plaintiff actually observed the Philadelphia cargo "leaning over on us" (R., p. 29); and actually observed that it created a condition of danger to him,

and the other longshoremen in the hold (R., pp. 61, 63 *et seq.*). He called this condition to the attention of his superior (R., pp. 30, 62) who thereupon ordered some of the leaning Philadelphia cargo removed from the vessel (R., pp. 30, 62). Part of the Philadelphia cargo was removed, but not enough to satisfy plaintiff who still wanted to take out more in order "to be sure" (R., pp. 66, 67). Plaintiff continued working directly under the unsafe cargo pile and shortly thereafter several bags of the Philadelphia cargo fell and injured him (R., p. 85). The bags which struck plaintiff fell from the place where plaintiff told his superior that more cargo should be removed in order "to be sure" (R., p. 68).

It is admitted that there were no defects in the structure or appliances of the vessel; that the vessel took no part whatever in discharging the cargo; that no officer of the ship was present at any time during the same, and that the whole operation was under the direction and control of the stevedoring company, an independent contractor and plaintiff's employer.

Jurisdiction of This Court.

This petition seeks a review of the decision of the Circuit Court of Appeals for the Second Circuit in reversing the decree of the United States District Court for the Eastern District of New York. The date of the Order for Mandate which contains the decision sought to be reviewed is January 27, 1942 (R., p. 206).

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; U. S. C., Title 28, Sec. 347).

The Question Presented.

The opinion of the District Court on the trial dismissing the action is printed in the record at pages 197-198. The opinion of the District Court denying plaintiff's motion for a new trial is printed in the record at pages 15-21.

The opinion of the Circuit Court of Appeals reversing the District Court is printed in the record at pages 202-206.

The District Court held that there was no defect in the structure or appliances of the "Cantuaria" (R., p. 16) and that the vessel and its cargo were in safe condition when turned over to the stevedore (R., p. 18); that no condition of danger arose until the longshoremen discharged a part of the New York cargo which had supported the Philadelphia cargo (R., p. 18); that the stevedore was engaged for his special skill and experience in discharging cargo (R., p. 19); and that the defendant could not be held liable for the condition of danger which developed and disclosed itself to plaintiff during the discharge of the vessel, and which it was the stevedore's, and not the defendant's duty, to remedy; and that the duty of the vessel owner in the stowage of cargo is with reference to the safe carriage of the cargo and the stability and trim of the vessel and is not referable to the safety of professional stevedores and their professional employees engaged to discharge the cargo at the end of the voyage.

The Circuit Court completely rejected this reasoning and reversed the finding of the District Court on the new and novel theory that the wall of Philadelphia cargo formed a part of the ship to the same degree that a ship's bulkhead, a part of the structure

of the ship, forms a part of the ship. And after so holding in accordance with this theory the Circuit Court held that the defendant's duty to the plaintiff was to be gauged by the rules of law governing in cases where the injury is caused by a defect in the structure or appliances of the vessel itself.

The specific question presented, therefore, is—is the cargo of a ship to be deemed a part of the structure of the ship to the extent that a shipowner's duty to longshoremen unloading the vessel is to be gauged by the rules of law governing cases where defects in the structure of the vessel itself are the cause of injury?

Reasons For Allowance of Writ.

1. *The decision in this case by the Circuit Court now creates a square conflict between the Second Circuit and the decisions in other Federal Circuits with respect to the long established rules:*

1. That the vessel owner is liable for injury to an independent stevedore only where the injury is caused by a defect in the vessel's structure or appliances; that the vessel's duty to the stevedore and longshoremen is to turn the vessel over to the stevedore and longshoremen in a safe condition and furnish a reasonably safe place to work and reasonably safe access thereto.

2. That it is the stevedore's duty to see that the cargo is discharged in a manner which is safe for its employees.

3. That the duty of the vessel owner in the stowage of cargo is with reference to the safe carriage of the cargo and the stability and trim of the vessel, and is not referable to the safety

of professional stevedores and their professional employees engaged to discharge the cargo at the end of the voyage.

Prior to the decision of the Circuit Court in this case all Circuits were in agreement on these rules of law. Decisions in the Second Circuit, in which this case was decided, setting forth these rules follow:

The Hindustan, 37 F. (2d) 932, affd. (C. C. A. 2) 44 F. (2d) 1015 (decided November 3, 1930);

Long v. Silver Line (C. C. A. 2), 48 F. (2d) 15 (decided April 6, 1931);

DeLuca v. Shepard (C. C. A. 2), 65 F. (2d) 566, 67 F. (2d) 437 (decided November 13, 1933).

This Circuit Court has now completely rejected the measure of a vessel owner's liability which was settled by these long established rules, and decided the case upon a new and novel theory, namely, that the wall of the Philadelphia cargo formed a part of the structure of the ship to such an extent that the vessel owner now becomes liable for injury caused by a fall of *the very cargo* which the stevedore has under its control for the purpose of unloading.

Following are decisions in other Circuits, with which the decision of the Circuit Court in this case is in direct conflict:

The First Circuit.

Weldon v. United States, et al., 9 Fed. Supp. 347 (decided November 5, 1934).

The Fourth Circuit.

The Beechdene, 121 F. 593 (decided January 6, 1899).

The Fifth Circuit.

Bettis v. Frederick Leyland & Co., Ltd., 153 F. 571 (decided March 12, 1907);

Navigazione Alta Italia v. Vale, 221 F. 413 (decided March 8, 1915);

Luckenbach S. S. Co. v. Buzynski, 19 F. (2d) 871 (decided June 2, 1927);

Bryant v. Vestland, 52 F. (2d) 1078 (decided October 27, 1931);

The Prince Rupert City, 30 Fed. Supp. 755 (decided December 7, 1939);

The Ellenor, 39 Fed. Supp. 576 (decided May 26, 1941).

The Ninth Circuit.

The Kongosan Maru, 292 F. 801 (decided October 19, 1923);

Grays Harbor Stevedore Co. v. Fountain, 5 F. (2d) 385 (decided April 27, 1925);

The Mercier, 5 Fed. Supp. 511 (decided December 4, 1933);

Ove Tysko v. Royal Mail, 81 F. (2d) 960 (decided February 10, 1936).

2. A further reason for the allowance of this Writ is found in the fact it seriously prejudices the uniformity of the general maritime law, in that the stevedores and longshoremen are as clearly identified with maritime affairs as the mariners themselves, and, consequently, governed by the general maritime law.

This was distinctly adjudged by the Supreme Court in the carefully considered case of

Atlantic Transport Co. v. Imbrovek, 234
U. S. 52 (decided May 25, 1914).

3. *The decision in this case seriously prejudices the rights of vessel owners by radically changing the measure of their duties to independent professional stevedores engaged to load or discharge vessels, at a time when the great increase in shipping resulting from our war effort requires the speedy loading and discharge of vessels, and adherence to the settled rules of the vessel owners' liability.*

A mere reading of the opinion of the Circuit Court of Appeals demonstrates that a vessel owner may no longer rely upon the experience and skill for which professional independently contracting stevedores are engaged. As a result of this decision a vessel owner is made an insurer, as to stevedores, of the safe stowage of cargo, since the cargo has been held to be a part of the ship itself. As the result of this decision if a longshoreman deliberately exposes himself to a danger, *actually known to him*, the vessel may be held liable for the resulting injury. It follows therefore that in these days of great shipping activity a vessel owner, in order to protect himself from claims of longshoremen injured by falling cargo, must first restow the cargo himself, before allowing skilled and independent stevedore to go into the hold to discharge the cargo. This means that it will take almost twice as long to unload a vessel, thus sharply curtailing the usability of vessels, so vitally needed in war time shipping.

The decision of the Circuit Court affects the fundamental rules for the determination of controversies

arising out of occurrences of this kind. A Writ of Certiorari should be granted in order that the question presented herein may be definitely decided and the uniformity of the maritime law restored.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit directing that court to certify and send to this court, for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 130, October Term, 1941:

LAZZARO LA GUERRA,
Plaintiff-Appellant,
—against—

LLOYD BRASILEIRO,
Defendant-Respondent.

and that the decision of the said Circuit Court of Appeals rendered on the 8th day of January, 1942, and the Order for Mandate dated January 27, 1942 (R., pp. 202-206), be reversed and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated: New York, February 28, 1942.

LLOYD BRASILEIRO,
By OSCAR R. HOUSTON,
Counsel for Petitioner.